PATRICIA A. CUTLER, Assistant U.S. Trustee (#50352)
STEPHEN L. JOHNSON, Trial Attorney (#145771)
EDWARD G. MYRTLE, Trial Attorney (DC#375913)
MARGARET McGEE, Trial Attorney (#142722)
U.S. Department of Justice
Office of the United States Trustee
250 Montgomery Street, Suite 1000
San Francisco, CA 94104
Telephone: (415) 705-3333
Facsimile: (415) 705-3379

Attorneys for United States Trustee
LINDA EKSTROM STANLEY

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	No.	01-30923 DM
PACIFIC GAS & ELECTRIC COMPANY,	Chapter	11
Debtor.	Date:	July 5, 2001
	Time:	9:30 a.m.
	Place:	235 Pine St., 22nd Floor San Francisco, California

UNITED STATES TRUSTEE'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER VACATING APPOINTMENT OF THE OFFICIAL RATEPAYERS' COMMITTEE

TABLE OF CONTENTS

I. INTRODUCTION . . . . . -1-

II. ARGUMENT . . . . . -3-

A. PG&E MISLED THE COURT REGARDING THE LEGAL BASIS FOR THE RATEPAYERS' CONTINGENT CLAIMS; THEY HAVE CLAIMS QUA RATEPAYER . . . . . -3-

1. RATEPAYERS HAVE CONTINGENT CLAIMS AGAINST PG&E FOR PRE-PETITION ACTS AND OMISSIONS FOR WHICH PRESENT AND FORMER RATEPAYERS HAVE A RIGHT TO A REFUND. . . . . -3-

2. RATEPAYERS HAVE CONTINGENT PRE-PETITION DAMAGE CLAIMS ON WHICH THEY CAN SUE DIRECTLY. . . . . -6-

B. THE COURT COMMITTED CLEAR ERROR IN FINDING SOME RATEPAYERS HAVE PRE-PETITION CLAIMS AND THEN VACATING THE U.S. TRUSTEE'S APPOINTMENT OF THE COMMITTEE. . . . . -11-

1. THE COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO THE U.S. TRUSTEE TO PROVE THAT CLAIMS EXIST; PG&E, DID NOT NEGATE ALL POTENTIAL CLAIMS AND ESTABLISH THE U.S. TRUSTEE'S ACTION WAS ARBITRARY OR CAPRICIOUS. . . . . -11-

2. AT THE HEARING WHEN THE COURT AND PG&E'S COUNSEL AGREED SOME RATEPAYERS HAVE CLAIMS, THE COURT SHOULD HAVE DEFERRED TO THE U.S. TRUSTEE'S DISCRETION . . . . . -11-

C. IT WAS ERROR AND MANIFESTLY UNJUST TO REFUSE TO ALLOW THE RATEPAYERS' COMMITTEE TO APPEAR THROUGH COUNSEL . . . . . -13-

III. CONCLUSION . . . . . -13-

TABLE OF AUTHORITIES

FEDERAL CASES

All Hawaii Tours, Corp. v. Polynesian Cultural Center,
116 F.R.D. 645, (D. Hi. 1987); 1

Bradley v. United States of America,
26 Cl.Ct 699 (U.S.Cl.Ct. 1992) 12

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962) 12

California Dept. of Health Serv. v. Jensen (In re Jensen),
995 F.2d 925 (9th Cir. 1993) 5

Franklin Savings Assoc. v. Director of the Office of Thrift Supervision,
934 F.2d 1127, (10th Cir. 1991) 11, 12

Futoran v. Rush (In re Futoran),
76 F. 3d 265, (9th Cir. 1996) 6

In re Hassanally,
208 B.R. 46, (BAP 9th Cir. 1997) 5

In re Johns-Manville,
36 B.R. 743, (Bankr.S.D.N.Y. 1984) 5

In re Laclede Cab Co.,
145 B.R. 308, (Bankr. E.D. Mo. 1992) 10

In re Wheeler Technologies,
139 B.R. 235 (BAP 9th Cir. 1992) 12

Matter of Southmark Corp.,
88 F. 3d 311, (5th Cir. 1996), ... 6

Pennsylvania Dept. of Public Welfare v. Davenport,
495 U.S. 552, 558 (1990) 6

Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 652 (1963) 12

School District No. 1J Multnomah County Oregon v. Acand S, Inc.,
5 F.3d 1255, (9th Cir. 1993) 1

STATE CASES

Assembly of the State of California v. Public Utilities Commission,
12 Cal.4th 87, 906 P.2d 1209, 48 Cal.Rptr.2d 54 (1995) 4

California Manufacturers Association v. Public Utilities Commission,
24 Cal.3d 836, 598 P.2d 836, 157 Cal.Rptr. 676 (1979) 3

Cory v. Public Utilities Commission,
33 Cal.3d 522, 658 P.2d 749, 189 Cal.Rptr. 386 (1983) 4

Danna v. Consolidated Edison Co. of New York,
337 N.Y.S.2d 722, 71 Misc.2d 1029 (1972) 8

Ford v. Pacific Gas & Electric Co.
60 Cal.App.4th 696, 70 Cal.Rptr.2d 359 (1997) 7

L.A. Cellular Telephone Co. v. Superior Court,
67 Cal.App.4th 1013, 76 Cal.Rptr.2d 894, (1998) 8

Lowenschuss v. Southern California Gas Co.,
11 Cal.App.4th 496, 14 Cal.Rptr.2d 59 (1992) 6, 9

Neihaus Bros. Co. v. Contra Costa Water Co.[,]
159 Cal. 305, (1911) 6, 9

Pacific Bell v. Colich,
198 Cal.App.3d 1234, 244 Cal.Rptr. 714 (1988) 7

Pink Dot, Inc. v. Teleport Communications Group,
___ Cal.App.4th ___, 2001 WL 541347 (Apr. 23, 2001) 7

San Diego Gas & Electric Co. v. Superior Court of Orange County,
13 Cal.4th 893, 920 P.2d 669, 55 Cal.Rptr.2d 724 (1996) 7

Shankman v. Consolidated Edison Co. of New York,
404 N.Y.S.2d 787, 94 Misc.2d 150 (1978) 8

Waters v. Pacific Telephone Co.,
12 Cal.3d 1, 114 Cal.Rptr. 753, 523 P.2d 1161, (1974) 7

FEDERAL STATUTES

11 U.S.C. § 101(5)(a) 10

11 U.S.C.A. § 101(5)(A) 5

Administrative Procedures Act, 5 U.S.C. § 706 12

Fed. Rules Civ. Proc. Rules 59(e) 1

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Federal Rules of Bankruptcy Procedure 9023 1

STATE STATUTES

Cal. Pub. Util. Code, § 453.5 3

OTHER AUTHORITIES

C.P.U.C. Tarrif Rule 14 . . . . . passim

NOTICE

Please take notice that on July 5, 2001, at 9:30 a.m. or as soon thereafter as the matter may be heard, the United States Trustee will move the court for reconsideration of the order vacating the appointment of the official committee of ratepayers (Ratepayers' Committee) on the grounds the court's decision to vacate the appointment of the Ratepayers Committee was clear error and manifestly unjust, pursuant to Federal Rules of Bankruptcy Procedure 9023 and 9024.

MOTION

I. INTRODUCTION

Pursuant to Federal Rules of Bankruptcy Procedure 9023 and 9024, the United States Trustee hereby moves this court for reconsideration of the order vacating the appointment of the Ratepayers Committee on the grounds that the court's decision to vacate the appointment of the Ratepayers Committee was clear error and manifestly unjust in light of 1) the court's reliance on PG&E's material misrepresentations concerning the existence of ratepayers' contingent claims; 2) the court's holding ratepayers are creditors, and then vacating the appointment of the committee; and 3) the court's refusal to permit counsel for the Ratepayers Committee to be heard.

Reconsideration is appropriate if (1) the court is presented with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law. Fed. Rules Civ. Proc. Rules 59(e) and 60(b), made applicable to bankruptcy proceedings pursuant to Fed. Rules Bankr. Proc. 9023 and 9024; *School District No. 1J Multnomah County Oregon v. Acand S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *citing, All Hawaii Tours, Corp. v. Polynesian Cultural Center,* 116 F.R.D. 645, 648 (D. Hi. 1987); *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988). There may also be other, highly unusual, circumstances warranting reconsideration. *Id.* In this case, clear error is present and the decision will result in manifest injustice.

PG&E has misled the court on two important points of law supporting ratepayers' contingent claims. Contrary to PG&E's representations to the court: 1) the CPUC may and

does order refunds to present and former customers, not simply future rate adjustments; and 2) PG&E is not wholly insulated for its failure to supply power pre-petition; substantial claims can be made in suits directly against the utility. Two major CPUC decisions issued just prior to this case provide support for these potential claims. The CPUC's investigation of inter-affiliate transfers (CPUC 01-04-002) and reconsideration of PG&E's accounting during the deregulation transition (CPUC 01-03-082) set the stage for rate rebates and damage claims for failure to supply power.

PG&E's General Counsel, neither qualified as an expert nor under oath, offered expert legal opinions about the ratepayers' claims. He made vague reference to Rule 14 and the CPUC website without offering copies into evidence. The "authority" presented was not cited in either of PG&E's extensive briefs. The U.S. Trustee had no opportunity to provide counter arguments or authorities. She had no notice of the authorities and no "expert" present, and the court stated the matter was submitted as soon as PG&E's closing argument/"expert" testimony was finished.

The court conceded some ratepayers were creditors but erroneously required they have claims qua ratepayer. As the U.S. Trustee shows, they have claims qua ratepayer. Further, no authority exists for the court's erroneous view that ratepayer creditors must have claims, distinct from those of other unsecured creditors, for the U.S. Trustee to appoint a ratepayers' committee to represent ratepayers with claims, distinct or otherwise.

Finally, the court should have permitted counsel for the Ratepayers' Committee to appear at the hearing. The hearing on PG&E's motion to abolish the Ratepayers' Committee was expedited by stipulation with the U.S. Trustee at PG&E's request. Counsel for the committee had not filed a brief by the time of the hearing because the committee had just engaged counsel few days earlier. New counsel was not given adequate opportunity to be heard on behalf of the committee.

//

//

//

II. ARGUMENT

A. PG&E MISLED THE COURT REGARDING THE LEGAL BASIS FOR THE RATEPAYERS' CONTINGENT CLAIMS; THEY HAVE CLAIMS QUA RATEPAYER

1. Ratepayers Have Contingent Claims Against PG&E For Pre-Petition Acts And Omissions For Which Present And Former Ratepayers Have A Right To A Refund.

The court relied on representations of PG&E's general counsel, Roger Peters, that any recoveries to which ratepayers will be entitled will not result in a "right to payment" under the Bankruptcy Code, but simply a future rate reduction that would not benefit former customers. *Memorandum Decision Regarding Motion for Order Vacating Appointment of Committee of Ratepayers* (Mem.) at 7. Mr. Peters misled the Court.

It is well-settled that when the CPUC orders refunds to utility customers, such refunds are apportioned among current and former customers on an equitable basis. (Cal. Pub. Util. Code, § 453.5.) Refunds are not reflected solely as a reduction to future rates or as a credit to current customers' bills. Section 453.5 of the California Public Utilities Code explicitly provides:

> Whenever the commission orders rate refunds to be distributed, the commission shall require public utilities to pay refunds to all current utility customers, and, when practicable, to prior customers, on an equitable pro rata basis without regard as to whether or not the customer is classifiable as a residential or commercial tenant, landlord, homeowner, business, industrial, educational, governmental, nonprofit, agricultural, or any other type of entity.
>
> For the purposes of this section, "equitable pro rata basis" shall mean in proportion to the amount originally paid for the utility service involved, or in proportion to the amount of such utility service actually received.
>
> Nothing in this section shall prevent the commission from authorizing refunds to residential and other small customers to be based on current usage.

Interpreting section 453.5, the California Supreme Court has explained that whereas balancing-account procedures generally mandate the *prospective* adjustment of cost over-collections, section 453.5 provides for the return of rebate funds to prior customers of the utilities. The court held that refunds under section 453.5 must be "returned to current and, insofar as practical, to prior customers of the utilities, in proportion to the gas usage of such customers during the periods to which the rebates relate." *California Manufacturers*

Association v. Public Utilities Commission, 24 Cal.3d 836, 840, 845-46, 598 P.2d 836, 841, 157 Cal.Rptr. 676, 681 (1979).

The California Supreme Court has consistently reaffirmed that when the CPUC determines that refunds are warranted, the Commission is authorized — in fact required — to distribute refunds among both former and current utility customers. In *Cory v. Public Utilities Commission*, 33 Cal.3d 522, 658 P.2d 749, 189 Cal.Rptr. 386 (1983), for example, the CPUC ordered Pacific Telephone and Telegraph Company to refund over-collections to former and current utility customers. When Pacific Telephone reported to the CPUC that approximately $6 million in refunds were undeliverable either because checks had been returned undelivered or checks had not been cashed, the CPUC took the position that it was authorized under section 453.5 to pay the unclaimed refunds to the utility's current customers. *Id.* at 526. The Supreme Court disagreed, holding that the CPUC is not authorized to forfeit the refunds of the unlocated former customers. *Id.* at 528. Instead, the Court held, the property should be held for the benefit of the unlocated former customers and for the use of the state in accordance with the Unclaimed Property Law. *Id.* at 529. The *Cory* decision underscores the firm entitlement of former utility customers to refunds under section 453.5 — an entitlement that does not dissipate even where the former customers in question cannot be located.

In a more recent Supreme Court decision, *Assembly of the State of California v. Public Utilities Commission,* 12 Cal.4th 87, 906 P.2d 1209, 48 Cal.Rptr.2d 54 (1995), the Court held that a CPUC order distributing the entire refund principal to current utility customers was in flat violation of section 453.5. The Court noted that the purpose of enacting section 453.5 was "to restrict the Commission's discretion with respect to the use of ratepayer funds ordered by the Commission." (*Id.,* at p. 100.) Under section 453.5, the Court held, the CPUC must apportion rate refunds equitably among current and prior customers; the Commission had no authority to direct the principal refunds to current customers only. (*Id.*, at p. 101.)

Because any refunds distributed by the CPUC will not take the form of prospective

rate adjustments only, PG&E's former customers have a "right to payment" within the meaning of section 101(5) — a right contingent, of course, on the CPUC's decision to order refunds in the first place. Contingent rights to payment like those belonging to the ratepayers here fit squarely within the definition of "claims" under the clear language of section 101(5) of the Code.

The court's view of "claim" and "debt" does not square with established Supreme Court and Ninth Circuit law. In the court's view the U.S. Trustee must establish that a "particular ratepayer [has] a right to payment, or...that PG&E owes a debt ...to such ratepayer." *Mem. at 7.* The U.S. Trustee's previous brief cited *In re Johns-Manville,* 36 B.R. 743,754-55, fn. 6. (Bankr.S.D.N.Y. 1984) and legislative history for the correct view of the law that the requirement of the "right to payment" was eliminated when the Code replaced the Act. The Ninth Circuit, as well, has rejected the "right to payment" or "accrued state law claim" test in *California Dept. of Health Serv. V. Jensen (In re Jensen),* 995 F.2d 925 (9th Cir. 1993), stating:

> To hold that a claim for contribution arises only when there is an enforceable right to payment appears to ignore the breadth of the statutory definition of "claim." In relevant part, a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C.A. § 101(5)(A). This "broadest possible definition" of "claim" is designed to ensure that "all legal obligations of the debtor, no matter how remote or contingent, will be dealt with in the bankruptcy case." H.R. Rep. No. 595, 95th Cong., 2d Sess. 1,309 (1978), reprinted in 1978 U.S.C.C.A. N. 5963, 6266 (emphasis added); S. Rep. No. 598, 95th Cong., 2d Sess. 1, 22, reprinted in 1978 U.S.C.C.A.N. 5787, 5808 (same). The breadth of the definition of "claim" is critical in effectuating the bankruptcy code's policy of giving a debtor a "fresh start." [citation omitted]. Frenville's "right of payment" theory is "widely criticized" outside the Third Circuit,... at least in part because it would appear to excise "contingent" and "unmatured" claims from § 101(5)(A)'s list.

Id. at 929-930; *see In re Hassanally,* 208 B.R. 46, 51(BAP 9th Cir. 1997) (stating that the "right to payment" or "accrued state law claim" test, which has been rejected by the Ninth Circuit and other circuits, is no longer viable in the Ninth Circuit).

Contrary to the court's view - that the existence of a claim is not sufficient, there must be a "debt," the Supreme Court has held that the meaning of the terms "debt" and "claim"

are co-extensive. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990). The courts of appeal have also reaffirmed the above principles. See *Matter of Southmark Corp.*, 88 F. 3d 311, 317-18 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 686 (1997) (stating that the terms "debt" and "claim" are co-extensive); *Futoran v. Rush* (In re Futoran), 76 F. 3d 265, 267 (9th Cir. 1996).

2. Ratepayers Have Contingent Pre-Petition Damage Claims On Which They Can Sue Directly.

Mr. Peters also misled the court with respect to the regulatory law on PG&E's potential liability for breach of its utility duty to supply power:

> At oral argument PG&E's general counsel provided the court with authority that PG&E, as a regulated utility, would be insulated from liability because of problems encountered by ratepayers as a result of rolling blackouts. That authority was not questioned by counsel for the UST or others appearing in opposition to the Motion. See also, Neihaus Bros. Co. v. Contra Costa Water Co.[,] 159 Cal. 305, 318-319 (1911); Lowenschuss v. Southern California Gas Co., 11 Cal.App.4th 496, 14 Cal.Rptr.2d 59 (1992).

Mem. at 6.

The authority PG&E cited was Rule 14 of its electrical tariffs. See Reporter's Transcript of Proceedings, May 18, 2001 ("RT") at 54; and CPUC Tariff Rule 14 (Rule 14), both attached to the Declaration of Patricia Martin filed herewith:

> [Mr. Peters]...That is reflected in rule 14 of PG&E's tariffs which have been adopted by the commission. The concept here is if the independent system operator determines that there's insufficient power in the system, the independent system operator declares the outage situation to occur and orders the utility -- all utilities in the State -- to comply with that. Under our tariffs, when we're ordered to reduce supply and have to administer rotating outages, there is no liability to PG&E associated with that.
>
> So the claim that there are -- there's a blackout claim pre-petition is very questionable because there are very specific blackouts that you can identify by circuit, by individual, and perhaps Mr. Butler's was a circuit outage.
>
> THE Court: Well I think he said his was not the subject of a blackout. But your point, that I understand you to say is, the blackouts that have been experienced recently, under the authority that you cite, the company has no liability because of the blackout?
>
> MR. PETERS: Yes, that's correct.
>
> THE Court: All right.

(RT at 54.) At no time did PG&E produce Rule 14 or offer any admissible evidence of its contents before or during the hearing on its motion. In fact, California law has long recognized the right of direct action to recover for breach of the utility obligation - a right Rule 14 actually enlarges.

California law explicitly authorizes actions against public utilities:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

Cal. Pub. Utils. Code § 2106; *see also San Diego Gas & Electric Co. v. Superior Court of Orange County*, 13 Cal.4th 893, 916, 920 P.2d 669, 55 Cal.Rptr.2d 724 (1996); *Ford v. Pacific Gas & Electric Co.* 60 Cal.App.4th 696, 701, 70 Cal.Rptr.2d 359 (1997).

Historically, California utility tariffs have contained language that immunizes a public utility from liability for ordinary negligence but not for gross negligence or other wrongful conduct. For example, in *Pacific Bell v. Colich*, 198 Cal.App.3d 1234, 244 Cal.Rptr. 714 (1988), the court considered a cross-complaint against a telephone company for damages caused by a severed cable. The utility invoked the provision of its tariff — also denominated "rule 14" — that precluded liability for ordinary negligence. The court reversed dismissal of the action on demurrer, holding that the plaintiff ought to have been given leave to amend the cross-complaint to allege gross negligence or willful misconduct. Numerous cases have reached the same conclusion. *E.g.*, *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1, 12, 114 Cal.Rptr. 753, 759, 523 P.2d 1161, 1167 (1974) (noting liability under tariff for gross negligence); *Pink Dot, Inc. v. Teleport Communications Group*, ___ Cal.App.4th ___, 2001 WL 541347 (Apr. 23, 2001) (tariff does not insulate utility from intentional torts, gross negligence, willful misconduct, fraud, or violations of law).

The language of Rule 14 has been modified to *expand* the utility's liability not merely

to cases of gross negligence but to any "failure to exercise reasonable diligence." The tariff rule begins with the directive that:

> PG&E will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to the customer, but does not guarantee continuity or sufficiency of supply. PG&E will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind of character occasioned thereby, if same is caused by inevitable accident, act of God, fire, strikes, riots, war, or any other cause except that arising from its failure to exercise reasonable diligence.

Thus, the current tariff makes PG&E liable for damages arising from the utility's ordinary negligence. It is worth noting that other jurisdictions imposing this standard have held electric utilities liable for blackout damages. *E.g.*, *Shankman v. Consolidated Edison Co. of New York*, 404 N.Y.S.2d 787, 94 Misc.2d 150 (1978) (damages from New York blackout); *Danna v. Consolidated Edison Co. of New York*, 337 N.Y.S.2d 722, 71 Misc.2d 1029 (1972) (damage to appliance from low-voltage brown-out).

In fact, ratepayers have claims under either standard — ordinary or gross negligence. More importantly, however, ratepayers have claims based not on negligence at all but on wrongful misconduct and violations of law, including unfair business practices. *See L.A. Cellular Telephone Co. v. Superior Court*, 67 Cal.App.4th 1013, 1019, 76 Cal.Rptr.2d 894, 898 (1998) (tariff limitation on utility liability does not apply to allegations of violations of law such as those arising under Cal. Bus. & Prof. Code § 17200).

At oral argument on May 18, PG&E's Peters also alluded to the third paragraph of Rule 14, which reads:

> Under no circumstances shall PG&E be liable to its customers or their agents for any local or system deficiencies in supply stemming from inadequate power bids into the Power Exchange (PX), or power deliveries over the Independent System Operator (ISO) grid. Similarly, PG&E shall not be liable to any customer, or electric service provider, for damages or losses resulting from interruption due to transmission constraint, allocation of transmission or inter-tie capacity, or other transmission related outage, planned or unplanned.

Mr. Peters did not point out the limitations in that paragraph's reach. PG&E's liability would be predicated not on the ISO's receiving too few bids nor a transmission constraint, but on inter-corporate transfers and other acts that may constitute unfair business practices, mismanagement, and other violations of law that resulted in PG&E's failure to have and to

provide sufficient power to meet its ratepayers' loads. PG&E may claim confidence it can defeat ratepayers' claims on the merits, but that confidence is irrelevant to ratepayers' status as creditors — indeed, as creditors with claims potentially reaching into the billions of dollars.[1/] The court should not have been deciding whether ratepayers' claims are allowable at a hearing on PG&E's motion to vacate the committee's appointment

Ratepayers may argue PG&E's pre-petition transfers to its parent corporation were wrongful, allegedly leaving the utility undercapitalized and leading to the breach of its utility obligation to supply power. These transfers have been reported by independent audits of the utility's financial condition and are the subject of a CPUC investigation into possible lack of compliance with earlier CPUC orders on the formation of utility holding companies. *Order Instituting Investigation Whether Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and Their Respective Holding Companies, PG&E Corporation, Edison International, and Sempra Energy, Respondents, Have Violated Relevant Statutes and Commission Decisions, and Whether Changes Should Be Made to Rules, Orders, and Conditions Pertaining to Respondents' Holding Company Systems* (2001) Cal. P.U.C. No. 01-04-002. The transfers may have contributed to the debtor's claimed cash-shortage and the breach of its utility obligation, as

---

[1/] The Court cites *Niehaus Bros. Co. v. Contra Costa Water Co.* (1911) 159 Cal. 305 and *Lowenschuss v. Southern California* (1992) 11 Cal.App.4th 496 for the proposition that PG&E would be insulated from any claims stemming from the occurrence of rolling blackouts. (Mem. at 6.) Neither case is pertinent here. Both addressed whether a utility could be held liable *in negligence* for failing to take necessary measures to protect its consumers from extraordinary types of harm, concluding in each case that it could not. In *Niehaus*, the court held that a water company does not owe a duty in tort to extinguish a fire when it undertakes to supply water to a consumer for general purposes. (*Niehaus*, *supra*, at pp. 318-19 ("[T]he primary business of a water company is to furnish water as a commodity, and not to extinguish fires . . . .").) The *Lowenschuss* court, relying on the court's decision in *Niehaus,* held that a gas company does not have a duty to shut off the flow of gas when it is aware that a neighborhood of homes may be in the path of a large fire. (*Lowenschuss, supra,* at p. 501.) Neither *Niehaus* nor *Lowenschuss* deals with the utility's ordinary obligation to provide adequate everyday service to its customers under a statute akin to section 451. In any event, at most these cases might inform a court hearing the merits on whether ratepayers can prevail under various theories, a question not now before the Court. On the question of whether ratepayers may pursue these claims, California statutory and case law are explicit that they can.

may the holding company's failure to restore capital to the debtor. *See id.* at 15-16 (noting holding companies' obligation, under prior CPUC decision, to give "first priority" to utilities' capital needs to discharge utility obligation to serve, and ordering utilities to show cause why they failed to infuse capital as the utilities' financial conditions deteriorated and to show cause "why their evident failure to provide sufficient capital to their utility subsidiaries . . . did not violate . . . the 'first priority' condition" of that decision).

It must also be stressed that the court appears to be reading far too narrowly the nature of ratepayers' claims. To be sure, those suffering, for instance, personal injuries and property damage incurred in a blackout may seek to recover damages for those losses, but PG&E's claimed liability is far broader than these kinds of claims. PG&E had and has a public utility obligation to serve. Cal. Pub. Utils. Code § 451. PG&E breached that obligation when it failed to provide the power necessary to meet its load, forcing the state to procure wholesale power on behalf of its ratepayers, but the California Public Utilities Commission (CPUC) has been explicit that in no way is PG&E's utility obligation extinguished. *Southern California Edison Co.* (2001) Cal. P.U.C. Dec. No. 01-01-046 at 7 ("State law clearly requires utilities to serve their customers, and a threatened bankruptcy filing or threat of insolvency does not change that obligation."). The breach of this duty has not merely caused physical injuries but also massive economic losses as ratepayers have had to purchase power at rates vastly higher than those at which PG&E was required to provide ratepayers electricity. At stake here is not merely the occasional Ming vase knocked over in the dark but the overcharges suffered by *every* PG&E ratepayer from the first rate-increase in derogation of the statutory rate-freeze, Cal. Pub. Utils. Code § 368(a), until PG&E's chapter 11 filing on April 6.

Whether PG&E was guilty of wrongful intentional acts resulting in customers' loss of power is, of course, a question of whether ratepayers can prevail on their claims, not whether they have claims "contingent, matured, unmatured, disputed, [or] undisputed." 11 U.S.C. § 101(5)(a & b). *See In re Laclede Cab Co.*, 145 B.R. 308, 309 (Bankr. E.D. Mo. 1992) ("the fact that the debtor had disputed a creditor's claim was insufficient for the court

to interfere with the Trustee's choice which meets the statutory criteria") (citations and internal quotations omitted).

B. THE COURT COMMITTED CLEAR ERROR IN FINDING SOME RATEPAYERS HAVE PRE-PETITION CLAIMS AND THEN VACATING THE U.S. TRUSTEE'S APPOINTMENT OF THE COMMITTEE.

1. The Court Erroneously Shifted The Burden of Proof To The U.S. Trustee To Prove That Claims Exist; PG&E Did Not Negate All Potential Claims and Establish The U.S. Trustee's Action Was Arbitrary or Capricious.

The court shifted the burden of proof to the U.S. Trustee to show that claims exist and committed clear error when it held that ratepayers must establish their claims. *Mem.* at 6. The converse is true. PG&E must prove no claims exist, and it has failed in its burden because it has not succeeded in negating the existence of all claims by ratepayers.

The general rule is that the party challenging an agency's action has the burden of proving error. *Franklin Savings Assoc. v. Director of the Office of Thrift Supervision*, 934 F.2d 1127, 1140-1141 (10th Cir. 1991) and cases cited therein. A presumption of validity exists for the agency's action. Id. Thus, to prevail in its motion to vacate the U.S. Trustee's appointment, the burden should have been on PG&E to overcome the presumption that the U.S. Trustee's action was valid and to show by a preponderance of the evidence that the U,S. Trustee's decision to appoint the Ratepayers Committee lacked any basis in fact or law or was arbitrary or capricious. It has not done so, as it is undisputed some claims exist, thus providing a basis for the U.S. Trustee's actions.

2. At The Hearing When The Court And PG&E's Counsel Agreed Some Ratepayers Have Claims, The Court Should Have Deferred To The U.S. Trustee's Discretion.

In its decision, the court conceded some ratepayers have claims. *Mem.* at 6. And, we submit, that should have ended the inquiry. However, the court postulates that these would be represented by the Unsecured Creditors committee, and, without authority, opines that ratepayers must have claims qua ratepayers to warrant a committee. First, as set forth in this brief, ratepayers do have claims qua ratepayers for rebates and breach of the statutory obligation to serve. Second, the fact that many ratepayers may have ordinary

unsecured claims provides the U.S. Trustee with authority to appoint an additional creditors committee to represent ratepayers with claims.

During the May 18 hearing, the Court and PG&E's counsel agreed that if the Court found that ratepayers were creditors then the Court must respect the decision of the U.S. Trustee in appointing a committee:

> [MR. LOPES]....I don't know where we go if this Court makes its finding, which it -- I think it has to make in order to appoint this committee, that the -- that they're creditors. And I don't know where that leads us, but I –
> THE Court: Well, if I found that, doesn't that end my inquiry? And then am I not bound to respect the U.S. Trustee's exercise of discretion? I mean do I tell her who should be on the committee? Do I tell her I think you ought to put, you know, some –
> MR. LOPES: No, no, I'm not -
> THE Court: -- personal injury claimants?
> MR. LOPES: I'm not saying that, Your Honor....

RT. at 9-10

This view is consistent with authorities cited by the U.S. Trustee that the court should defer to the U.S. Trustee decision to appoint a separate committee of creditors to represent various constituencies. *In re Wheeler Technologies,* 139 B.R. 235 (BAP 9th Cir. 1992). If, as the court and PG&E postulate, the standard were abuse of discretion, PG&E has not met its burden of proof that the U.S. Trustee's appointment of a committee was an abuse of discretion. The standard of review for abuse for discretion by the U.S. Trustee equates with review of an action by a government agency under the Administrative Procedures Act, 5 U.S.C. § 706 *et.seq*. Under that standard an agency's decision must be arbitrary and capricious and the agency's decision is entitled to a presumption of regularity. *Franklin Savings Assoc. v. Director of the Office of Thrift Supervision*, *supra*, 934 F.2d at 1140-1141, *citing*, *Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 825, 28 L.Ed.2d 652 (1963). A reviewing court is not empowered to substitute its judgment for that of the agency and the agency decision need not be the only reasonable one or the one that the reviewing Court would have reached. *Bradley v. United States of America*, 26 Cl.Ct 699 (U.S.Cl.Ct. 1992), *aff'd*, 1 F.3d 1`252 (Fed. Cir. 1993), *citing*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69, 83 S.CT. 239, 245-46, 9 L.Ed.2d 207 (1962).

C. IT WAS ERROR AND MANIFESTLY UNJUST TO REFUSE TO ALLOW THE RATEPAYERS' COMMITTEE TO APPEAR THROUGH COUNSEL

The court refused the request of the U.S. Trustee to allow newly-retained counsel for the Ratepayer Committee to appear on its behalf. The U.S. Trustee agreed to PG&E's expedited briefing and hearing providing less than two weeks for the committee to act. The committee located and retained counsel only a few days before the hearing. Each committee member timely filed a declaration, and the Ratepayers' Committee Counsel and her partner specializing in regulatory law should have been allowed to articulate the interests of the creditor constituency represented by the Ratepayers' Committee. To bar their appearance with so little notice and opportunity to be heard is error and manifestly unjust.

III. CONCLUSION

Based on the foregoing, this court should reconsider and vacate its order vacating the appointment of the Official Ratepayers Committee.

Date: May 29, 2001

Respectfully submitted,
Patricia A. Cutler
Assistant United States Trustee

By: _____
Attorneys for United States Trustee

PROOF OF SERVICE

I, the undersigned, state that I am employed in the City and County of San Francisco, State of California, in the Office of the United States Trustee, at whose direction the service was made; that I am over the age of eighteen years and not a party to the within action; that my business address is 250 Montgomery Street, Suite 1000, San Francisco, California 94104, that on the date set out below, I served a copy of the attached;

U.S. TRUSTEE'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER VACATING APPOINTMENT OF THE OFFICIAL RATEPAYERS COMMITTEE

DECLARATION OF MARGARET McGEE IN SUPPORT OF U.S. TRUSTEE'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER VACATING APPOINTMENT OF THE OFFICIAL RATEPAYERS COMMITTEE

each party listed below by placing such a copy, enclosed in a sealed envelope, with prepaid postage thereon, in the United States mail at San Francisco, California, addressed to each party listed below.

Debtor
Pacific Gas and Electric Co.
P.O. Box 7442
San Francisco CA 94120

Debtor's Attorney
James L. Lopes
William J. Lafferty
Howard Rice Nemerovsky et al.
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111-4065

Attorney for Creditors Committee
Paul S. Aronzon, Esq.
Robert Jay Moore, Esq.
Milbank, Tweed, Hadley & McCloy LLP
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017 5735

Attorney for Ratepayers Committee
Kaaran E. Thomas, Esq
Beckley Singleton Chtd.
530 Las Vegas Blvd., South
Las Vegas, NV 89101

Aaron Paul, Esq
Eric A. Nyberg, Esq
Kornfield Paul & Nyberg
1999 Harrison Street, Suite 800
Oakland CA 94612

Attorney for Calpine Corp
Richard A. Lapping
Thelen Reid & Priest, LLP
101 Second Street, Suite 1800
San Francisco CA 94105-3601

Attorney for Reliant Energy
Randy Michelson
McCutchen Doyle Brown & Enersen
Three Embarcadero Center
San Francisco CA 94111-4067

Penn A. Butler
Brooks & Raub
721 Colorado Ave #101
Palo Alto, CA 94303

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 29, 2001.

By: _____
A. LEE